

No. 350541

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IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

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IN RE THE MATTER OF THE ESTATE OF DAN McANALLY  
AND THE RISTE TRUST

Darrell Riste, beneficiary of the  
Estate and the Riste Trust

Appellant/Petitioner

v.

Baker Boyer Bank,  
the Personal Representative of the Estate of Dan McAnally, and  
the Trustee of the Riste Trust

Appellee/Respondent

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**RESPONDENT'S BRIEF**

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## **I. INTRODUCTION**

Notwithstanding the Appellant's disjointed and lengthy opening brief, the issues before the Court are straightforward and easily resolved by turning to the Will and probate statutes. The probate court scrutinized the Personal Representative's actions and issued a careful opinion denying each of the Appellant's claims that the Personal Representative breached its fiduciary duties when administering Decedent Dan McAnally's Estate ("Estate").

This appeal arises from the administration of the Estate of Dan McAnally. Mr. McAnally ("Decedent") died testate. His Will, which designated Respondent Baker Boyer Bank as the Personal Representative, was admitted to probate.

The bank petitioned the probate court for appointment. The court granted the petition, appointing the bank as Personal Representative to act with nonintervention powers.

The primary Estate asset was a collection of seven contiguous commercial real estate parcels located in Selah, Washington. CP 93-103. The Appellant refers to that property as the "Real Property and Land, Business Entity Assets and Buildings" ("RPLBEAB") in his opening brief. In this brief, the Respondent refers to the same property by its common name, the "Viking Village Shopping Center." Most of the Appellant's

Assignments of Error relate in some manner to the sale of the Viking Village Shopping Center.

The Appellant's disjointed brief challenges most of the probate court's Findings of Fact and Conclusions of Law. Likely in order to preserve a companion action containing similar breach of fiduciary duty claims against the law firm and attorneys representing the Personal Representative, the Appellant does not ask this Court to review the merits of the probate court's Findings of Fact and Conclusions of Law, but rather merely asks that the matter be remanded to the probate court for further proceedings. Brief of Appellant at 12-13; CP 248.<sup>1</sup>

Further proceedings are unnecessary. The probate court's Findings of Fact and Conclusions of Law are well-reasoned and based on substantial evidence. The Respondent respectfully requests the Court affirm the probate court's Findings of Fact and Conclusions of Law.

## **II. STATEMENT OF FACTS**

### **A. The Estate of Dan McAnally**

The Decedent was a single man who died testate on September 22, 2012, leaving no surviving issue and no readily ascertainable heirs. CP 1-20.

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<sup>1</sup> In addition to the Appellant's companion action, he has also filed suit against one of his attorneys, Rick Tuha. The case is pending in Yakima County Superior Court.

At the date of death, the Decedent's Estate was as follows:

- Commercial Real Estate - \$1,700,000.00
- Personal Residence - \$233,500.00
- Bank Accounts - \$699,266.00
- Personal Property - \$5,170.00
- Furniture and Household Goods - \$5,000.00

CP 418-423

**B. The Will of Dan McAnally**

The Decedent's Will contained specific bequests. CP 1-6. The Decedent bequeathed the Appellant all of the Decedent's items of tangible personal property (CP 1-2 ¶ 4.2.1) and the Decedent's personal residence (CP 2 ¶ 4.2.2). The personal residence, the vehicles and the remaining tangible personal property were all distributed to Appellant who signed a receipt on May 8, 2014 acknowledging receipt of his full distributive share. CP 86-87.

The Will contained two pecuniary bequests. CP 1 ¶ 5. The Appellant and another of the Decedent's friends, Fred Wickholm, were each given an amount equal to thirty percent (30%) of all bank accounts and other bank deposits standing in the Decedent's name at the time of the his death. CP 76-77.



Mr. Wickholm filed a creditor's claim for the amount of \$14,392.00 on January 29, 2013, which he subsequently withdrew. His claim, therefore, was not paid. The only distribution that Mr. Wickholm received was his pecuniary bequest in the amount of \$209,780.00, which represented his thirty percent (30%) as set forth in the Will. CP 2 ¶ 5.2; CP 76-77; CP 80.

**C. The Riste Trust**

The Will refers to a Trust known as the Riste Trust ("Trust"). CP 2 ¶ 7. The instant appeal is an appeal from a Final Account and Petition for Distribution of the Decedent's Estate. The Trust was never a party to that proceeding and therefore should not be a party in this appeal.

**D. Baker Boyer Bank - The Personal Representative**

The Will was admitted to probate on September 25, 2012, in the Yakima County Superior Court of Washington under Cause No 12-4-00514-8. CP 1-20. No one contested the terms or validity of the Will within the statutorily prescribed limitation period of four months.

The Will appointed Baker Boyer Bank as the Personal Representative to act with nonintervention powers. Notice of the Respondent's appointment was provided as required by law. CP 1-20.

**E. The Viking Village Shopping Center**

The Viking Village Shopping Center is not a planned shopping center in the conventional sense. It consists of a number of contiguous real estate parcels containing structures located in close proximity. The buildings were constructed between 1960 and 1968. Maintenance had been deferred. The buildings and the parking lot require substantial maintenance and capital improvements in the near future. The net cash flow for the period October 1, 2012, to May 1, 2014, (a period of 19 months) was calculated at \$186,044.56 or \$9,791.82 per month. CP 130.

The shopping center was formally appraised at an initial value of \$1,700,000.00, which was comprised of \$740,279 for the structures with an economic life of approximately 40 years, \$60,416.00 for the asphalt with an economic life of 25 years and real property valued at \$937,686.00. CP 110, CP 122-123. The appraiser in valuing the property used a capitalization of income method. The appraiser did not use rent from the Viking Village Shopping Center but from other shopping centers, which were newer and in better condition. CP 88-133.

The Respondent received and accepted an offer to sell the Viking Village Shopping Center for \$1,451,000.00 cash subject to a Level I environmental assessment and approval by the probate court. CP 95-103. The Appellant did not want the Viking Village Shopping Center sold (CP

91 ¶ 10), so out of an abundance of caution the Respondent petitioned the probate court to approve the sale. A hearing was held on July 8, 2014. One of the Appellant's attorneys attended the July 8, 2014 hearing, but did not object to the sale. The probate court entered an order authorizing the Respondent to sell the property for \$1,451,000.00. CP 132-133.

A Level II environmental assessment was performed on the Viking Village Shopping Center property. The results of the Level II environmental assessment showed soil contamination primarily from an auto repair shop, which had operated on the property for many years. CP 229-246, CP 245. The testing agency estimated that the cleanup costing approximately \$450,000.00.

A second appraisal was requested due to comments from local real estate brokers who thought the list price was way too high. CP 522-523. The appraiser valued the property using a capitalization of income of the Viking Village Shopping Center itself and arrived at a total value of \$1,100,000 as of January 15, 2014. The second appraisal did not value the improvements and the land separately.

Consideration was given to again petition the probate court to approve the sale at the \$1,100,000 amount, however, in the interim **the Appellant sent an email to the Respondent authorizing the sale** of the

property at the \$1,100,000 amount, so no petition was filed. CP 215-225; CP 521-523.

The Respondent settled the Estate's estate tax obligation with the State of Washington and received a tax refund plus interest on February 9, 2016. CP 462, 489.

**F. Declaration of Completion**

The Respondent filed a Declaration of Completion on September 8, 2016. CP 265-271. The Appellant filed his objection to the Declaration of Completion on September 15, 2016. CP 272-306. The Respondent filed a Declaration in Support of Attorney's Fees, CP 307-407, and a Response, Final Account and Petition for Distribution, CP 408-518, on November 10, 2016.

The probate court held a hearing on November 18, 2016. CP 545-549. The court issued several oral rulings and requested that the Respondent prepare proposed findings of fact and conclusions of law to be presented in court at a subsequent date. *Id.*

The probate court entered Findings of Fact and Conclusions of Law on January 26, 2017. CP 591-612. This appeal followed. CP 613-639.

**G. The Appellant has been Represented by Counsel From the Beginning**

On February 7, 2013, the Appellant's counsel, P. Rick Tuha of the Idaho Law Group in Nampa, Idaho, advised the Respondent's counsel that he represented the Appellant, Cathy Riste, Tyler Riste, Kyler Riste and Gracie Riste. CP 195-198. On or about March 21, 2014, attorney Levi E. Liljenquist of Spokane, Washington, moved for Mr. Tuha's limited admission pro hac vice, which motion was granted by order dated March 21, 2014. CP 71-75.

On March 21, 2014, attorney Tyler S. Farmer of Yakima, Washington, appeared as co-counsel for the Appellant. CP 69-70.

On March 26, 2014, Mr. Liljenquist appeared as local counsel for the Appellant. CP 78-79.

On September 6, 2016, attorney Samuel R. Walker, an attorney practicing in Long Beach, California, filed a notice of appearance without stating who he was representing. CP 140-141. Mr. Walker was not admitted to practice in Washington, although was subsequently granted limited pro hac vice admission. Mr. Walker advised that all pleadings were to be sent to Kennewick, Washington attorney Kevin L. Holt. *Id.* Mr. Holt did not appear as an attorney of record.

Mr. Tuha, Mr. Farmer, Mr. Liljenquist and Mr. Walker are all currently counsel of record for the Appellant.

### **III. ARGUMENT**

#### **A. The Standard of Review is “Substantial Evidence.”**

The “substantial evidence” test is used to decide whether to uphold a trial court’s findings of fact. *Ridgeview Props. v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). When a trial court has weighed the evidence, as it has in the instant matter, appellate review is limited to determining whether substantial evidence supports the trial court’s findings of fact and conclusions of law. *Id.* (citing *Holland v. Boeing Co.*, 90 Wn.2d 384, 390, 583 P.2d 621 (1978)); *Morgan v. Prudential Ins. Co. of Am.*, 86 Wn.2d 432, 545 P.2d 1193 (1976).

#### **B. Fiduciary Duties of a Personal Representative in Washington.**

The Appellant argues the probate court erred by not finding the Respondent breached its fiduciary duties as Personal Representative of the Estate and Trustee of the Trust - this theme pervades the Appellant’s opening brief. The Appellant’s arguments as they related to the fiduciary duties of a trustee are misplaced - the Trust is not at issue.

As to the at-issue fiduciary duties of the Personal Representative, the probate court concisely described these fiduciary duties:

I have reviewed RCW 11.28.250 and 11.68.070 as well as Mr. Riste’s referenced code sections. I am also mindful of

the law regarding a personal representative's fiduciary responsibility, which can be succinctly summarized as follows:

The executor is an officer of the court and in a fiduciary relationship to those beneficially interested in the estate. He is obligated to exercise the utmost good faith and utilize the skill, judgement and diligence that an ordinarily cautious and prudent person would employ in the management of his own affairs. *Hesthagen v. Harby*, 78 Wn.2d 934, 943, 481 P.2d 438 (1971); *In re Estate of Peterson*, 12 Wn.2d 686, 733, 123 P.2d 733 (1942). He must perform his duties not only for the benefit of the legatees but must also protect the estate from invalid and doubtful claims, *In re Estate of [Shea]*, 69 Wn.2d 899, 421 P.2d 356 (1966), while protecting the rights of valid creditors. *Kerns v. Pickett*, 49 Wn.2d 770, 306 P.2d 1112 (1957). It is his duty to settle an estate as quickly as possible but without sacrifices to the estate, *National Bank of Commerce v. Patterson*, 179 [Wash.] 638, 644, 38 P.2d 361 (1934), and he is liable for any breach of his responsibility which causes loss to another. *Hesthagen v. Harby, Supra*. His trust must be fulfilled with conscientious fidelity whether his charge is large or small. *Wilson's Estate v. Livingston*, 8 Wn. App. 519, 527-28, 507 P.2d 902, 909, *rev. denied*, 82 Wn.2d 1010 (1973).

CP 608.

As highlighted below, the probate court expressly found there was substantial evidence that the Respondent did not violate its fiduciary duties. CP 591-612.

**C. Washington Law did not Require the Viking Village Shopping Center be Distributed in Kind.**

The Appellant contends that title to the Viking Village Shopping Center vested in him upon the Decedent's death under Washington law. Brief of Appellant at 17. This argument fails.

The probate court properly found the Appellant was applying "too narrow" of an interpretation of RCW 11.04.250 and that his argument was "rejected" by RCW 11.68.090, which authorizes a personal representative with non-intervention power the power to sell real property without court approval. CP 591-612; 609. Washington law supports the probate court's findings and conclusions regarding this issue. Chapter 11.04 of the Revised Code of Washington ("RCW") governs the succession of intestate estates.

RCW 11.04.250 states, in pertinent part:

When a person dies seized of lands, tenements or hereditaments, or any right thereto or entitled to any interest therein in fee or for the life of another, his or her title shall vest immediately in his or her heirs or devisees, subject to his or her debts, family allowance, expenses of administration, and any other charges for which such real estate is liable under existing laws. No administration of the estate of such decedent, and no decree of distribution or other finding or order of any court shall be necessary in any case to vest such title in the heirs or devisees, but the same shall vest in the heirs or devisees instantly upon the death of such decedent: **PROVIDED, That no person shall be deemed a devisee until the will has been probated.** The title and right to possession of such lands, tenements, or



hereditaments so vested in such heirs or devisees, together with the rents, issues, and profits thereof, shall be good and valid against all persons claiming adversely to the claims of any such heirs, or devisees, excepting only the personal representative when appointed, and persons lawfully claiming under such personal representative; and any one of more of such heirs or devisees, or their grantees, jointly or severally, may sue for and recover their respective shares or interest in any such lands, tenements, or hereditaments and the rents, issues and profits thereof, whether letters testamentary or of administration be granted or not, from any person **except the personal representative and those lawfully claiming under such personal representative.**

RCW 11.04.250 (emphasis added).

Under RCW 11.04.250, title to real property at death vests **subject to probate**, and it vests against everyone **except the personal representative.**

This is particularly true in cases where the personal representative is appointed with nonintervention powers as we have in the instant matter.

RCW 11.68.090(1) expressly authorizes the personal representative to “sell” and “convey” real property:

Any personal representative acting under nonintervention powers may borrow money on the general credit of the estate and may mortgage, encumber, lease, **sell**, exchange, **convey**, and otherwise have the same powers, and be subject to the same limitations of liability, that a trustee has under chapters 11.98, 11.100, and 11.102 RCW with regard to the assets of the estate, both real and personal, all without an order of court and without notice, approval, or confirmation, and in all other respects administer and settle the estate of the decedent without intervention of the court. Except as otherwise specifically provided in this title or by

order of court, a personal representative acting under nonintervention powers may exercise the powers granted to a personal representative under chapter 11.76 RCW but is not obligated to comply with the duties imposed on personal representatives by that chapter. A party to such a transaction and the party's successors in interest are entitled to have it conclusively presumed that the transaction is necessary for the administration of the decedent's estate.

RCW 11.68.090(1) (emphasis added).

Plus, RCW 11.98.070, which establishes the powers and limitations of a trustee and is cited to illustrate the breadth of power that a personal representative has, provides in pertinent part:

A trustee, or the trustees jointly, of a trust, in addition to the authority otherwise given by law, have discretionary power to acquire, invest, reinvest, exchange, **sell, convey**, control, divide, partition, and manage the trust property in accordance with the standards provided by law, and in doing so may: . . . (2) **Sell on credit; . . . and (15) Select any part of the trust estate in satisfaction of any partition or distribution, in kind, in money or both; make nonprorata distributions of property in kind; allocate particular assets or portions of them or undivided interests in them to any one or more of the beneficiaries without regard to the income tax basis of specific property allocated to any beneficiary and without any obligation to make an equitable adjustment . . .**

RCW 11.98.070(1) (emphasis added).<sup>2</sup>

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<sup>2</sup> The Appellant cites to RCW 11.100.140, which establishes guidelines and restrictions for "significant non-routine transactions." That provision does not, however, apply to personal representatives. *See* RCW 11.100.140(8) ("The requirements of this section, and any similar requirements imposed by prior case law, shall not apply to personal representatives. . .").

Therefore, the statutes clearly did not require the Respondent to distribute the Viking Village Shopping Center in kind.

**D. The Terms of the Will did not Require the Viking Village Shopping Center be Distributed in Kind.**

The Appellant then contends the Will required the Viking Village Shopping Center to be distributed to him in kind. Brief of Appellant at 17. The probate court properly found that the Decedent's will did **not** contain a specific bequest of the Viking Village Shopping Center. CP 594, CP 609.

Notably, the probate court recognized the Will contained specific bequests for (1) the Decedent's personal residence, (2) the Decedent's tangible personal property, and (3) a pecuniary bequest from all bank accounts and other bank deposits. CP 591-612; 594, 609.

The probate court relied on the following testamentary language contained in the Will to support its findings that there were (1) specific bequests for certain assets and (2) **no specific bequest** for the Viking Village Shopping Center:

4. SPECIFIC BEQUESTS:

\* \* \*

4.2 If my friend, DARRELL D. RISTE, survives me:

4.2.1. Except as disposed of in paragraph 4.1 above, I give to my friend, DARRELL D. RISTE, my clothing, jewelry, personal effects, household

furniture and furnishings, appliances, china, crystal, silverware, books, paintings, pictures, sports equipment, boats, motorized vehicles held for personal use, and my interest in any property or liability insurance policy covering such items. If my friend, DARRELL D. RISTE, does not survive me, this bequest shall lapse.

4.2.2. I give to my friend, DARRELL D. RISTE, all of my interest in the real property and improvements located in Yakima County, Washington, and occupied by me as my principal residence. That real property is described as:

The northwest quarter of the northwest quarter of the southwest quarter and the west 25 feet of the south 240 feet of the northeast quarter of the northwest quarter of the southwest quarter, all located in Section 3, Township 13 North, Range 18, E.W.M.

Currently designated as Yakima County Parcel No. 181303-32012

If my friend, DARRELL D. RISTE, does not survive me, this request shall lapse.

CP 1-2.

The items described in Paragraphs 4.2.1 and 4.2.2 were distributed to the Appellant, and the Appellant acknowledged receipt of the bequests.

CP 86-87. The items listed in Paragraphs 4.2.1 and 4.2.2 had nothing to do with the Viking Village Shopping Center.

Paragraph 5 of the Will left to the Appellant a pecuniary bequest for thirty-percent (30%) of the Decedent's bank accounts and other bank deposits.

5. PECUNIARY BEQUESTS:

5.1. If my friend, DARREL D. RISTE, survives me, I give to him an amount equal to thirty percent (30%) of all bank accounts and other bank deposits standing in my name at the time of my death. If my friend, DARRELL D. RISTE, does not survive me, this bequest shall lapse.

CP 2.

The amount of the pecuniary bequest was determined to be \$209,780.00 by order of the probate court on March 21, 2014. The final amount of that pecuniary bequest was mailed to the Appellant on April 8, 2014. The Appellant acknowledged receipt of the bequest. CP 86-87.

Paragraph 6.1 of the Will left the residue of the Decedent's estate to Respondent Baker Boyer Bank as the Trustee of the trust for the benefit of the Appellant.

6. DISPOSITION OF RESIDUE:

6.1. I give the residue of my estate to the trustee of the RISTE TRUST to be held, administered and distributed as provided therein.

CP 2.

Notably, the probate court properly found that the above-quoted testamentary language from sections 4.2 and 6.1 of the Will did not contain a specific bequest of the Viking Village Shopping Center. CP 594, CP 609. The Decedent did not intend to distribute the Viking Village Shopping Center in kind. RCW 11.12.230 ("All courts . . . shall have due

regard to the direction of will, and the true intent and meaning of the testator. . . .”).

Clearly the Decedent was aware that he could distribute assets by specific language in the Will. He did so with some items. The total lack of reference to the Viking Village Shopping Center in the Will evidences that he did not intend to distribute the Viking Village Shopping Center.

**E. The Viking Village Shopping Center was a Probate Asset.**

The Appellant next argues the Viking Village Shopping Center was not a probate asset: again a failing argument.

A probate asset is an asset that is governed by the terms of a decedent’s will. Alternatively, a non-probate asset is defined as “those rights and interest of a person having beneficial ownership of an asset that pass on the person’s death under a written instrument, or arrangement **other than the person’s will.**” RCW 11.02.005(10). Non-probate assets include retirement accounts, payable on death bank accounts, transfer on death accounts and joint bank accounts with right of survivorship. Real property does not qualify unless it passes under a written instrument **other than a will.**

Furthermore, even though the Appellant relies on RCW chapter 11.04, RCW 11.02.005(10) expressly excludes “a right or interest passing

by descent and distribution under chapter 11.04 RCW” from being a non-probate asset.

The Appellant also relies on RCW 11.11.010; however, that provision references an intervivos or living trust created by a decedent before death, which results in a decedent **not owning** the asset at death. That is inapposite to the instant matter where the Decedent owned the Viking Village Shopping Center at death thereby making it an estate asset subject to the terms of the Will.

The Appellant’s appeal is to be denied in this regard.

**F. The Will Does Not Limit Payments to Only Obligatory Debts.**

Next, the Appellant argues that “the Will specified only that the PR was authorized to pay obligatory debts.” Brief of Appellant at 19. There is insufficient evidence to support the Appellant’s argument. The Will merely directed the Respondent to pay taxes and costs of administration from the principal of the residue of the Estate. CP 5 ¶¶ 11.1 & 11.2. The Will did not limit in any way the Respondent’s authority to only pay “obligatory debts.”

The Appellant contends the Respondent should not have paid \$48,787 in estate taxes. Brief of Appellant at 19. The Appellant bases his argument on the premise that the Viking Village Shopping Center was a

non-probate asset, and therefore non-taxable. As an initial matter, the Respondent paid tax in the amount of \$2,027, not \$48,787. CP 462, 469.

Furthermore, the owed tax was properly paid. The Washington State estate tax is based upon the federal taxable estate. The Internal Revenue Code Section 2033 provides that “[t]he value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent **at the time of his death.**” 26 U.S.C. § 2033 (emphasis added). By its express terms, IRC 2033 does not differentiate between the characterization of the asset that is transferred (e.g., probate v. non-probate). It is only concerned with the value of the gross estate, which in the instant matter included the Viking Village Shopping Center.

The Appellant also contends that the Respondent breached its fiduciary duty by paying \$14,392 to satisfy a creditor’s claim filed by Fred Wickholm. In fact, the payment never occurred because the creditor’s claim was withdrawn. If the claim had been paid, however, it would have been proper because RCW 11.40.070(4) authorizes a personal representative to pay claims that may not satisfy the statutory claim requirements.

The only distribution to Mr. Wickholm was his pecuniary bequest of \$209,780.00, which the probate court found complete and that he was not entitled to any further distributions. CP 596, l. 7. The probate court



also found that the Respondent did not violate its fiduciary duty in making the distribution. CP 596, l. 1.

The probate court's decision is supported by substantial evidence; the Appellant fails to establish otherwise.

**G. The Sale of the Viking Village Shopping Center was not Prohibited by the Terms of the Will or Washington Law.**

The Appellant argues the probate court erred when it found that the Respondent did not violate the "Will/Riste Trust's written instructions or the RCW" by selling the Viking Village Shopping Center. Brief of Appellant at 20. Again, this argument lacks merit.

The probate court properly found that the Appellant was applying "too narrow" of an interpretation of RCW 11.04.250 and that his argument was "rejected" by RCW 11.68.090, which authorizes a personal representative with non-intervention power the power to sell real property without court approval. CP 591-612; 609. Washington law supports the probate court's findings and conclusions regarding this issue. The authority and analysis on this issue is contained in Section D above.

The Appellant also argues the terms of the Will and Washington law required that the Viking Village Shopping Center be retained unless an investment with a higher return could be obtained. Brief of Appellant at 19. The Appellant relies on paragraph 10.2 of the Will, however, that

paragraph applies to a trustee's powers, not those of the Respondent, who was serving as the Personal Representative, not the Trustee.

Additionally, assuming for the moment that the Viking Village Shopping Center was transferred into the Trust, the record does not contain evidence sufficient to support the Appellant's net income calculations. The Appellant's calculations fail to recognize that the Viking Village Shopping Center contained contaminated soils that required approximately \$450,000.00 in remediation costs if remediation was required in the future. If the Viking Village Shopping Center had been retained and transferred into the Trust as the Appellant contends, and remediation required, the Trust would have been required under RCW 11.104A.250 to charge the cost of the soil remediation to *Trust income*.

RCW 11.104A.250 states, in pertinent part, as follows:

A Trustee shall make the following disbursements from income to the extent that they are not disbursements to which RCW 11.04A.050(2)(ii) or (iii) applies:

\* \* \*

(3) All of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest . . .

RCW 11.104A.250(3).

In addition to paying soil remediation costs from the trust income, the Trustee would pay such things as repair costs to the parking lot, snow removal, roof repairs and taxes.

The Trustee would also have to use *trust income* to create a fund for depreciation. RCW 11.104A.270. The Will does not permit eroding principal to maximize income. The first appraisal that the Respondent obtained for the Viking Village Shopping Center estimated that the remaining useful life of the buildings was 40 years. The asphalt was estimated to have a useful life of 25 years.

Unlike the Decedent, the Trustee would not have had the authority to make a decision to defer maintenance and ignore depreciation. Washington law does not permit a trustee to waste the principal to maximize income.

The record supports the probate court's determination that the Viking Village Shopping Center was properly sold by the Respondent.

**H. The Respondent was not Required to Make Monthly Payments to the Beneficiaries.**

The Appellant relies on paragraph 7.1 of the Will to support his argument that the Respondent should have made monthly payments to the beneficiaries.

Paragraph 7.1 states as follows:

The trustee shall pay to my friend, DARRELL D. RISTE, during his lifetime, all of the net income from the trust in convenient installments. Such distribution shall preferably be made monthly, but at least quarterly.

CP 2.

The monthly payments that the Appellant claims should have been made are to come from the *Trust*. The Trust has not been fully funded, so there was not sufficient net income from which to make monthly payments.

The Appellant misconstrues the intent and meaning of the residue clause in the Will as it relates to the Viking Village Shopping Center. Brief of Appellant at 21. The Appellant incorrectly assumes the Viking Village Shopping Center was - regardless of the circumstances - to be transferred to the Trust. The probate court correctly determined that the Appellant's position was not supported by the evidence, or Washington law. As discussed herein, the Respondent had the authority to sell the Viking Village Shopping Center and did so to diversify the Estate assets - and with the approval of the Appellant. The probate court properly found that the Respondent had the authority to sell the Viking Village Shopping Center. CP 609.

Finally, there was no evidence presented to the probate court to show that there was sufficient income cash (as opposed to principal cash)

to pay monthly distributions to the Appellant. Most of the initial principal cash was used for paying pecuniary bequests and administration costs.

The Appellant's appeal is to be denied in this regard.

**I. The Respondent did not Provide False or Misleading Information.**

The Probate Court found:

There is no credible evidence in the record that the P.R. or its agents provided false or misleading information.

CP 610.

The Appellant argues this finding is in error because the Respondent mislead him with regard to the probate court's jurisdiction to order the sale of the Viking Village Shopping Center. This argument lacks merit.

First, the Appellant was and has been represented by one or more attorneys throughout the Estate administration process. Counsel for the Appellant was present during the hearing at which the probate court authorized the sale of the Viking Village Shopping Center.

Second, the Appellant's reliance on *English-McCaffery Logging Co. v. Clowe* is misplaced. 29 Wash. 721, 70 P. 138 (1902). That case does not hold that the trial court lacked jurisdiction to order a sale of real property because it vested at death. Rather, that case held that a petition to quiet title in a subsequent grantee was without merit because the property

had already been sold by the personal representative acting with nonintervention powers to the defendant.

Finally, the Appellant's argument that the Respondent had to allege insolvency in order to sell the Viking Village Shopping Center is meritless. The authority upon which the Appellant relies has been superceded by RCW 11.68.090, which provides that a personal representative with non-intervention powers is "entitled to have it conclusively presumed that the transaction is necessary for the administration of the decedent's estate." RCW 11.68.090(1). The Legislature enacted RCW 11.68.090 in 1974 to make earlier common law stating that a personal representative could not sell real property unless it was necessary to pay obligations of the estate obsolete.

For each of these reasons, the Appellant's claim that he was provided false or misleading information about the probate court's authority to approve the sale of the Viking Village Shopping Center lacks merit.

**J. The Respondent Sufficiently Complied With Its Accounting Requirements.**

The probate court found the Respondent complied with its fiduciary duties in providing an accounting and appraisal to the Appellant. Although the probate court noted that the inventory and

appraisement was delivered late, it determined that there was no breach of

fiduciary duty:

The statute [RCW 11.44.050] makes failures such as this a basis to revoke letters testamentary and imposition of terms against the personal representative. However, this is discretionary. When I weigh this failure against several factors, I find that it does not rise to the level of a breach of fiduciary duty. These factors are: the P.R. did finally provide Mr. Riste with a copy, Mr. Riste never sought Court action against the P.R. pursuant to RCW 11.44.020, Mr. Riste did not object to the late delivery to the Court until months after the fact, Mr. Riste did not challenge the validity of the information contained in the Inventory and Appraisement and Mr. Riste did not show that the late delivery harmed him.

CP 611.

The Appellant failed to show how the probate court's Findings of Fact and Conclusions of Law in this regard are not supported by substantial evidence and Washington law. *See Clancy v. McElroy*, 30 Wn. 567, 569, 70 P. 1095 (1902) (finding the trial court did not abuse discretion in refusing to remove executor for inadvertent delay in delivery of inventory). The Appellant's appeal must be denied.

**K. The Trust is Valid.**

The Appellant argues the Respondent should have notified the Appellant that the Trust was invalid. Brief of Appellant p. 36. The Appellant's argument is unsupported because the probate court's decision that the Trust is valid is supported by substantial evidence:

Mr. Riste challenges the validity of the Trust. He maintains that no will can create a trust, but that all trusts must be created by a document separate from the will. He cites RCW 11.25.250. His reliance is misplaced. “There are four elements required to create a testamentary trust: (1) a will evidencing testamentary intent to create a trust, (2) designation of the trust corpus, (3) designation of beneficiaries, and (4) specification of the terms of the trust.” *In re Estate of Collister*, 195 Wn. App. 371, 380-81, 382 P.3d 37, 42 (2016) (citing *Edwards v. Edwards*, 1 Wn. App. 67, 72, 459 P.2d 422 (1969)). All of these elements are present in Decedent’s Will, so the Trust is valid.

CP 609.

The probate court’s decision is correct. The Will contains all the elements required by law in order to create a valid trust. CP 1-6. The Appellant’s appeal lacks merit in this regard.

**L. There Was No Conflict of Interest Between the Respondent and Trustee.**

The Appellant claims there was a conflict of interest between the Respondent and the Trustee of the Trust. Brief of Appellant at 34-40. The purported conflict of interest is based on many of the same acts and omissions that the Appellant relies on for his breach of fiduciary duty claims. The Respondent has addressed and responded to the allegations in previous sections contained herein.

The Appellant presents sweeping arguments and asks the Court to determine that the probate court’s Findings of Fact and Conclusions of Law were not based on substantial evidence. Yet, the Appellant fails to



present any new evidence other than rehashing the same arguments that he made with regard to his breach of fiduciary duty claims. The probate court reviewed the evidence and properly exercised its discretion in finding no conflicts of interest. CP 595, 602, 609. The Appellant has failed to provide sufficient evidence to justify that this matter should be remanded for further proceedings. The appeal on this issue fails.

**M. Attorney's Fees**

The Appellant's claims lack merit. The Respondent requests that it be awarded fees under RCW 11.48.210. *Chesnin v. Fischler*, 43 Wn. App. 360, 717 P.2d 298 (1986).

**IV. CONCLUSION**

The probate court's Findings of Fact and Conclusions of Law are supported by substantial evidence. The Respondent respectfully requests the Court affirm the Findings of Fact and Conclusions of Law entered in the probate court.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 11th day of September, 2017, I caused a true and correct copy of the foregoing document, "Respondent's Brief," to be served electronically and via regular mail to the following counsel of record:

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Dated this 11th day of September, 2017, at Yakima, Washington.

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